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THE BENEFICIAL IMPACT OF THE SUPREME COURT'S DECISION IN KISOR V. WILKIE ON H-1B DENIALS

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In June 2019, when the Supreme Court handed down a decision in *Kisor v Wilkie*, it was yet to be seen what impact this decision would have on federal court challenges to H-1B denials. Prior to *Kisor*, federal courts adopted a deferential standard of the government's interpretation of its own regulations. This deferential standard was governed by an earlier Supreme Court decision, *Auer v. Robbins*, which held that courts would give deference to an agency's interpretation of its own ambiguous regulation. The *Auer* standard was similar to the standard set forth in *Chevron USA v. Natural Resources Defense Council* regarding how a federal court would give deference to an agency's interpretation of a statute. Under *Chevron* deference, if a statute is ambiguous, a court will give deference to the agency's interpretation, even if it does not agree with the outcome, so long as it is based on a permissible construction of the statute.

The Supreme Court in *Kisor* provided no new radical test of how it would view an agency's interpretation of its own regulation. It essentially "cabined the scope" of *Auer* deference, and set forth a three-step approach under *Kisor*. Under this test, the court must determine (i) that the regulation is "genuinely ambiguous" — the court should reach this conclusion after exhausting all the "traditional tools" of construction; (ii) if the regulation is genuinely ambiguous, whether the agency's interpretation is reasonable; and (iii) even if it is a reasonable interpretation, whether it meets the "minimum threshold" to grant *Auer* deference, requiring the court to conduct an "independent inquiry" into whether (a) it is an authoritative or official position of the agency; (b) it reflects the agency's substantive expertise; and (c) the agency's interpretation of the

rule reflects "its fair and considered judgment."

In our prior blog in December 2019, there were few decided cases involving challenges over H-1B visa denials that had applied the *Kisor* standard. We analyzed how the courts ought to apply the new *Auer* deference standard set forth in *Kisor*. Most H-1B visa adjudications are guided by regulations and policies rather than by the statute, and prior to *Kisor* courts have mostly been paying deference to the USCIS's interpretation of its regulations. Since December 2019, courts have applied the *Kisor* standard in challenges to denials of H-1B petitions, and have overturned denials as well as burdensome H-1B policy. This is indeed a welcome change!

H-1B denials resulted from the implementation of recent policy memos shifting the USCIS's position that was not aligned with its prior statements, memos, and opinions. One example of such a shift is the memo issued in February 2018 relating to contracts and itineraries with third-party clients. This new policy has enabled USCIS to play havoc to H-1B petitions filed by employers who place H-1B workers at third party client sites. If the third party client is unable to or refuses to provide documentation explaining the length of the assignment, and even if the employer provides evidence of its ability to employ the H-1B worker for the duration of the validity period, the USCIS has either denied the petition or shortened the validity period. The USCIS issued this memo to be read as supplementary guidance to the employer-employee memo of 2010. Even this 2010 memo has been used to trouble employers of H-1B workers. While 8 CFR 214.2(h)(4)(ii) defines an employer-employee relationship as including "hire, pay, fire, supervise, or otherwise control the work of any such employee", the USCIS has focused only on the employer's ability to control the H-1B worker and disregarded the other indicia of the employer-employee relationship.

In this blog, we analyze recent court decisions that have applied the *Kisor* standard or been influenced by it, and not paid deference to the USCIS's interpretation of its regulations or of policy memos stemming from these regulations.

ITServe Aliance v. Cissna

In *ITServe Alliance v. Cissna*, the U.S. District Court of the District of Columbia on March 10, 2020 invalidated the USCIS policy defining an employer-employee relationship for employers of H-1B workers as well as the 2018 policy and 1991 regulation requiring that IT firms provide a detailed itinerary and contracts for

potential H-1B workers for the entire three years of their visa stay. Judge Collyer held that the current USCIS interpretation of the employer-employee relationship requirement is inconsistent with its regulation, was announced and applied without rulemaking, and cannot be enforced. Moreover, the USCIS requirements that employers (i) provide proof of non-speculative work assignments (ii) for the duration of the visa period is not supported by the statute or regulation and is arbitrary and capricious as applied to Plaintiffs' visa petitions. These requirements were also announced and applied without rulemaking and cannot be enforced. Finally, the court held USCIS's itinerary requirement was superseded by a later statute that permits employers to place H-1B visa holders in non-productive status and is, therefore, no longer enforceable.

Although the court did not cite *Kisor,* it did not pay deference to USCIS's interpretation of its regulations even under the traditional *Auer* standard. Judge Collyer conducted an independent inquiry to determine if the USCIS 2018 memo is a legislative rule or a mere interpretive rule. We provide a detailed analysis of the *ITServe Alliance* decision.

While noting USCIS's effort to mask the memo as mere guidance to its adjudicators, Judge Collyer concluded that the 2018 memo is indeed a legislative rule with an attempt to impose legally binding obligations on regulated parties. The court also noted that the 2018 memo in essence (i) adopted a new definition of an employer; (ii) added substantive requirements to prove the employer-employee relationship; (iii) added additional requirements to describe the work with evidence that it will be available for the duration of the visa; and (iv) burdens petitioners to provide detailed itineraries on the risk of denial on failure to comply with the new requirements.

The 2010 employer-employee memo is based on the definition of an employer pursuant to 8 C.F.R. §214.2(h)(4)(ii), but the memo still indicates that the regulation does not provide enough guidance on the definition of the employer-employee relationship. The employer-employee memo invoked the common-law as touch stone of employer's control. Judge Collyer hollered at the USCIS from deviating from 8 C.F.R. §214.2(h)(4)(ii) specifically noting that it adopted the definition of employer under this rule which was identical to the one crafted by the Department of Labor in 1991, and to this date no amendments have been made to that definition by the USCIS. The court noted that USCIS's sole focus on "control" over everything else, if evaluated

under *Auer* deference, is in clear conflict with the regulations itself and hence warrants no deference. The court pointed out that the USCIS has been claiming that the term "employer-employee relationship" is not defined in the regulations, but noted that 8 C.F.R. 214.2(h)(4)(ii) clearly defines the term as:

> (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee

Given this, Judge Collyer noted that the USCIS's reliance on the common-law doctrine of "control" is contradictory to the clear definition provided under the regulations. It also noted that "he common law may be a useful touchstone but cannot contradict or limit a clear regulation that has been applied with no objection or correction for almost three decades" and hence is not worthy of any deference.

The court steered a remarkable analysis of the plain text of the regulations specifically the wordings *may hire, pay, fire, supervise, or otherwise control the work of employee*. In its analysis, the court noted that "he use of "or" distinctly informs regulated employers that a single listed factor can establish the requisite "control" to demonstrate an employer-employee relationship. This formulation makes evident that there are multiple ways to demonstrate employer control, that is, by hiring or paying or firing or supervising or "otherwise" showing control. In context, "otherwise" anticipates additional, not fewer, examples of employer control."

Judge Collyer further observed that through the 2018 memo, the USCIS attempted to substitute the unambiguous text of the regulations.

The court also analyzed if through the 2018 memo, that USCIS fundamentally conflated the requirement of employment in a specialty occupation with requiring evidence of non-speculative work assignments for the duration of the visa. To assess the legitimacy of requiring such evidence as a requirement of establishing a specialty occupation under the regulations, the court made a noteworthy distinction between "occupation" and "jobs". It affirmed that Congress enacted a definition of occupation and an occupation consists of various levels requiring varied job duties. Hence, as long as the employment is in the specialty occupation, there is no requirement in the definition to prove that the daily assignments will be part of the specialty occupation.

The USCIS argued that the requirement is based on its interpretation of its own regulation, i.e the fourth prong of the specialty occupation definition at 8 CFR 214.2(h)(4)(ii)(4) which justifies their new requirement to satisfy that the day to day assignments qualify as specialty occupation rather than satisfying that the occupation qualifies as a specialty occupation:

> (4) The nature of the specific duties so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Judge Collyer noted that first, all the four prongs are in alternative to each other, and secondly, the wording "nature of specific duties" in the fourth prong does not in any way change the requirement of a bachelor's degree in other three prongs. Hence, the court noted that the fourth prong provides a situation where despite the foreign worker not having a bachelor's degree, the position can qualify as a specialty occupation. It also noted that the USCIS cannot extend it as a policy to all H-1B visa holders requiring the description of the assignments for the whole duration and such interpretation of the fourth prong of the specialty occupation of its own regulation is "plainly erroneous".

As to itineraries in case of placement at more than one location, 8 C.F.R. §214.2(h)(2)(i)(B) reads as follows:

> Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

While interpreting the above-mentioned regulation, the itinerary memo of 1995 was issued which clearly stated that "the regulation does not require that the employer provide the Service with the exact dates and places of employment" and that the "he itinerary does not have to be so specific as to list each and every day of the alien's employment in the United States".

The former Immigration and Naturalization Service followed this interpretation of the regulation for more than two decades. Precipitously, in February 2018,

the USCIS issued the above-mentioned new policy memorandum superseding the 1995 memo. Interestingly, the new February 2018 memo also interprets the same regulations quoted above and notes that "here is no exemption from this regulatory requirement. An itinerary with the dates and locations of the services to be provided must be included in all petitions that require services to be performed in more than one location, such as multiple third-party worksites. The itinerary should detail when and where the beneficiary will be performing services". (Emphasis added)

Plaintiffs in *IT Serve Alliance v. Cissna* raised the itinerary question and the court agreed with plaintiffs' contention that the concern regarding non-availability of the work for the duration of the visa has already been addressed by the Congress through ACWIA 1998 which authorizes employers to place H-1B holders in the paid non-productive state. While referring to §212(n)(2)(C)(vii)(III), the Court concluded, "therefore, the itinerary requirement in the INS 1991 Regulation, as adopted by INS and now enforced by CIS pursuant to its 2018 Policy Memorandum, has been superseded by statute and may not be applied to H-1B visa applicants."

As to the USCIS's authority to issue approvals for less than three years, the court in *ITServe Alliance v. Cissna* interpreted the plain text of the regulation to mean that the regulations (i) do not require USCIS to deny or grant the petition in its entirety; (ii) "up to three years" allows USCIS to approve petitions for a lesser duration. However, the court noted that USCIS has been following a practice to issue approvals for full three years and now if it will grant the approval for less period, it has to be supported with a "legitimate reason".

More recently, a settlement was reached between the USCIS and plaintiffs of *ITServe Alliance* which invalidates the 2018 policy. Under this settlement, firstly, USCIS is required to rescind "in its entirety within 90 days" the 2018 Contract and Itinerary Memorandum. Secondly, USCIS agreed to "re-open and adjudicate" individual agency decisions on H-1B adjudications that were the subject of the *ITServe Alliance* lawsuit against USCIS (i.e., primarily the cases of its members). Thirdly, in deciding the cases again, "USCIS agrees that it will not apply the interpretation of the current regulatory language . . . defining 'United States employer' to require an analysis of employer-employee relationship under common law, and USCIS agrees to comply with Judge Collyer's March 10, 2020, decision in *ITServe Alliance, Inc. v. Cissna*." Fourthly, in adjudicating the cases again, "USCIS will not issue approvals for H-1B petitions with validity

periods shorter than the time period requested by the H-1B petitioner, unless such decisions include or are accompanied by a brief explanation as to why the validity period has been limited and in compliance with Judge Collyer's March 10, 2020, decision in *ITServe Alliance, Inc. v. Cissna*."

Serenity Info Tech, Inc. v. USCIS

Serenity Info Tech, Inc. v USCIS is the most recent case, where the court specifically deployed *Kisor* analysis. The plaintiffs in this case are information technology consulting services companies. The USCIS denied the H-1B petition filed by *Serenity Info Tech* on two grounds: (i) that the plaintiff failed to meet the definition of the "employer" under the regulations, and (ii) that the plaintiff failed to show specific and non-speculative qualifying assignments in a specialty occupation for the entire time requested on the petition. The issues in this case, similar to *ITServe Alliance*, hinged upon the USCIS's interpretation of the term "employer-employee relationship" and the term "itinerary" as provided in the regulations and as applied by the USCIS.

The court analyzed the litany of policy memo issued by the USCIS since 1995 including the 2010 employer-employee memo up until the 2018 contracts and itinerary memorandum. The court noted that the 2010 memo listed numerous documents that could be used to demonstrate the employer-employee relationship. However, the memo also specifically clarified that while requesting additional evidence, the adjudicator should not request a specific type of evidence unless required by the regulations. As discussed earlier, the 2018 memo did not rescind the Employer-Employee memo but was intended to be read together with it.

The plaintiffs argued that the 2018 memo essentially departed from the 2010 employer-employee memo as it insists on a demonstration of not just "right to control" but "actual and exclusive control" over the day to day activities which is *ultra vires* the regulations. The suit also challenged the detailed itineraries requirement established under the 2018 memo.

While deciding if the 2018 memo is a legislative rule or mere interpretative rule, the court distinguished from Judge Collyer's reasoning in *ITServe v Cissna*. Judge Collyer in *ITServe* ruled that the 2018 memo indeed is a legislative rule as "it attempted to impose legally binding obligations on regulated entities".
The *Serenity* court held that the 2018 memo is only an interpretive rule as it rescinded the 1995 memo which was an interpretive rule.

The court condensed the issue to a narrower ground of agency's interpretation of "employer" and "itinerary" provided under the regulation and as applied by the USCIS in the cases before the court and if it warrants any deference under *Auer*.

The court applied *Kisor* to decide if the agency's interpretation of the regulations deserves any deference and delved into an independent inquiry starting with if the regulations are ambiguous. Since the court in *Serenity InfoTech* held that the 2018 policy was an interpretive rather than a legislative rule, *Kisor* analysis was needed to determine whether the 2018 policy deserved deference or not. The court discarded USCIS's argument that even though the term "employer" is defined in the regulations, the terms "employee", "employed", "employment" or "employer-employee relationship" are not defined. Rather, the court clarified that the absence of definition does not amount to ambiguity. The regulations provide "ample guidance" to determine if the employer-employee relationship exists.

The court pointed out that the fundamental flaw with the USCIS's interpretation is that it obliterates all the other criteria mentioned in the regulations to establish an employer-employee relationship and focuses only on the "control" criteria. The court stated that USCIS's focus on "control" elevates that one factor above other factors. Doing so goes against the rule of construction "*ejusdem generis*" which requires that the following words in a statutory formation should be defined by reference to the preceding words. Thus, the court noted that the interpretation that emphasizes one criterion to the derogation of others is in contradiction of plain language of the regulations and therefore is "not worthy of deference".

The court further noted that even though the 2010 employer- employee memo incorporates common law, it specified that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive". In fact, the 2010 employer- employee memo provides guidance to evaluate the factors enumerated using a totality-of-the-circumstances test while determining if the employer established the "right to control" over beneficiary's employment. Therefore, the agency's fixation with the "ability to control manner and means in which the work product of the beneficiary is accomplished" is just one factor even under the 2010 employer-employee memo.

The USCIS in *Serenity Info Tech* argued that the detailed itinerary requirement under the 2018 memo is more in alliance with the plain language of the regulation than the guidance under the 1995 memo which interpreted that the plain language of the regulation allows accepting a general statement regarding proposed employment. The court ruled that as the regulations *unambiguously* list what the itinerary must include, the agency's itinerary interpretation also fails at the first step of *Kisor* analysis because there is nothing to interpret.

Further, the USCIS contended that the agency gets the regulatory basis to request a detailed itinerary from the fact that this information is imperative to demonstrate (i) non-speculative employment; and (ii) that the employees will be serving in a "specialty occupation".

The court noted that by requesting day to day activities, the agency is conflating "*non-speculative employment with non-speculative work assignments*" and there is no such requirement in the statute or the regulations to request day to day assignments. And as to the USCIS's reliance on the fourth prong as the regulatory basis to require detailed itinerary as evidence of specialty occupation, the court agreed in essence with Judge Collyer's decision in *ITServe Alliance* specifically noting the distinction drawn between "occupation" and "job".

It further noted that even though it is the "*agency's prerogative to ascertain generally whether the beneficiary will actually be serving in the purported specialty occupation but does not extend to micro-managing every aspect of the occupation's duties*." The court also acknowledged the impracticability of expecting US employers to be able to "identify and prove daily assignments for the future three years for professionals in specialty occupation."

In conclusion, the court decided that the regulations are clear and there is no basis in the statute or the regulations to submit day to day specific work requirements for the duration of the visa requested. Hence, the agency's interpretation of the unambiguous regulations owed no deference.

We now analyze court cases that have relied on *Kisor* to overturn "specialty occupation" denials.

Inspectionexpert Corporation v. USCIS

Inspectionxpert Corporation v. USCIS is a fine example of how *Kisor* has limited

the scope of *Auer* deference. At issue was the interpretation of the provision 8 C.F.R §214.2(h)(4)(iii)(A) (referred to as "the Provision" in the decision). This provision states the four criteria under which an employer can establish that the occupation qualifies as a specialty occupation for H-1B purposes. The key question was whether the USCIS's requirements of a degree in one singular subspecialty warranted deference. In this case, the petitioner challenged the denial of the H-1B petition based on the education requirements of the petition for the proffered position of a Quality Engineer. The requirements for the position were "*a bachelor's degree in Mechanical Engineering, Computer Science or a related technical or engineering field*". The USCIS denied the petition noting that:

> the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g nuclear engineering and aerospace engineering. Thus, a general degree in engineering or one of its other subspecialties, such as civil engineering or industrial engineering, is not closely related to mechanical engineering.

The issue at hand was USCIS's reliance on the interpretation of the Provision to conclude that "a general degree in engineering or one of its subspecialties" as required by the position does not qualify as a specialty occupation under the Provision. The court relied on the *Kisor test* to decide if the USCIS interpretation requires deference. The petitioner argued that the plain language of the Provision suggests that reference to the bachelor's degree implies a generic degree requirement. The court delved into the legislative history of the immigration statutes spanning over thirteen (13) pages before making an analysis on the issue and concluding why the USCIS's interpretation does not warrant deference. The court disagreed with petitioner's argument noting that it is in contravention of the "history and structure of the H-1B regulations" and affirmed that the "statutory and regulatory framework compels USCIS's reading under which 'the position at issue must require the attainment of a bachelor's or higher degree in a specific specialty".

However, the court still ruled in favor of the petitioner, and specifically pointed to the 1990 Rule where the former INS specifically mentioned that:

> The Service's interpretation over the years has been that the common denominator for determining that an occupation is a profession is the

> requirement of at least a baccalaureate degree awarded for academic study in a specific discipline or narrow range of disciplines.

Citing to the above, the court noted that the historical administrative practice of the agency clearly shows that the interpretation followed by the USCIS in this decision does not reflect its "authoritative" or "official position". The USCIS tried to backtrack its position on which the denial was based by emphasizing that the USCIS does not impose the one-degree rule. It only maintains that it cannot be a general degree. The court noted that concluding an engineering degree requirement as a generalized degree confirms the unreasonableness of the interpretation relied upon by the USCIS in the decision. The court noted that the INA defines professions (later substituted for specialty occupation) at a categorical level such as lawyers. It does not specify the specialty occupation as a "tax lawyer". More importantly, it specifically includes "engineers". The court also emphasized on the USCIS's reasoning of not including "liberal arts degree" as its broadness whereas engineering was specifically noted and included as a profession/specialty occupation.

The court concluded that a denial on the basis that an engineering degree is a generalized requirement is tenacious and "contrary to the statute and the Agency's past practices".

Besides, there have been multiple other recent decisions that reflect a trend of successfully challenging USCIS's denials of specialty occupation in broad violation of the statutory and regulatory text and also in contradiction of its own practice even if *Kisor* has not been specifically invoked. Below are two examples.

India House Inc. v. USCIS

In *India House v. USCIS*, the court held that a General Operations Manager position requiring a bachelor's degree in Hospitality Management or a directly related field qualifies as a specialty occupation. The court distinguished this case from *Royal Siam Corp. v. Chertoff, 484 F.3d 139 (1st Cir. 2007)* which established that a general-purpose degree such as a business administration degree is not a specific degree. The court noted that the requirement of a degree in Hospitality Management is a specific degree as the curriculum is dedicated specifically to food services and hospitality management which unlike a generic business administration degree cannot be used for any other institutional management The court also emphasized that even though the

USCIS is not bound by its prior approvals, it is worth noting that it approved the petition twice in the past for the same position for the same petitioner and the beneficiary. Hence, as there is no change in the law or regulations and the USCIS has not accepted that the issuance of the prior H-1B visas was erroneous, there is no explanation as to how a position that was a specialty occupation in the past suddenly does not qualify to be so now and would constitute abuse of discretion.

Taylor Made Software Inc. v. USCIS

Taylor Made Software Inc v. USCIS involved a position of Computer Systems Analyst where the USCIS denied the petition relying on OOH that many Computer Systems Analysts have a liberal arts degree and hence the occupation does not require a bachelor's level training in a specific specialty. The court disagreed and noted that the regulatory criterion is not that a bachelor's degree or its equivalent in a specific field is "always" required rather it states that bachelor's degree or its equivalent is "normally" the minimum requirement for entry into the occupation. Therefore, the OOH language that "most" computer systems analysts have a bachelor's degree in a specific field is the typical baseline.

In conclusion, the Supreme Court's decision in *Kisor* has proved to be more potent than originally envisaged, where the courts are no longer paying traditional *Auer* deference and are instead reversing H-1B denials based on the USCIS's erroneous interpretation of its own regulations. In addition to *Kisor,* the authors also acknowledge the brilliance and perseverance of ace litigators Jonathan Wasden and Bradley Banias who tenaciously fought many of these cases that brought down the house of cards that the government has stealthily built on shaky foundations with the sole purpose of obstructing meritorious and legitimate H-1B cases.

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